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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

X CORP., Plaintiff, **v.** **ROBERT A. BONTA, ATTORNEY GENERAL OF CALIFORNIA, IN HIS OFFICIAL CAPACITY,** Defendant.	2:23-CV-01939-WBS-AC **DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** Date: November 13, 2023 Time: 1:30 p.m. Courtroom: 5 Judge: Hon. William B. Shubb Trial Date: None set Action Filed: 9/08/2023

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INTRODUCTION

Plaintiff seeks to preliminarily enjoin California Assembly Bill ("AB") 587, a straightforward disclosure statute that requires social media companies with annual gross revenues of at least $100 million to publicly disclose information about their content-moderation policies and decisions, i.e., whether and how they take action against content and users that violate their terms of service. The statute is intended to provide transparency to Californians who consume and disseminate news and information on social media. Notwithstanding Plaintiff's representations, the statute does not dictate either the substantive content of any platform's terms of service or the manner in which those terms must be enforced. Plaintiff's motion for preliminary injunction should be denied.

Plaintiff has failed to show that it is likely to succeed on the merits of any claim. Plaintiff's First Amendment challenge fails because the statute meets the applicable *Zauderer* test for compelled speech in a commercial context: the law only requires covered social media companies make purely factual disclosures about their voluntary, existing content moderation policies and practices. Plaintiff argues that these requirements are somehow improper and subject to higher scrutiny because they may result in public pressure on Plaintiff to change its terms or service or content moderation practices. That concern does not take the law outside the scope of *Zauderer*, which often applies when companies would prefer not to disclose certain facts about their products or services. AB 587 would, in any event, satisfy a higher level of scrutiny. It serves the essential state interest of

maintaining an informed, enfranchised, and safe populace by providing Californians with information necessary to navigate among the disinformation, threats, and hate speech on social media. And, while other states have attempted to impose particular content moderation practices on social media companies, because AB 587 is merely a disclosure statute, its burdens are minimal.

Plaintiff also cannot prevail on its claim that SB 587 is preempted by section 230 of the Communications Decency Act. Section 230 generally immunizes social media platforms for their good faith, voluntary actions restricting content on their sites. 47 U.S.C. § 230(c)(2)(A). AB 587 is not inconsistent with this immunity because the bill does not penalize platforms for *any* of their content moderation actions, including any restrictions on content. AB 587 merely provides that a platform may be penalized if it fails to properly disclose specified high-level information about its general content moderation policies and practices.

Finally, Plaintiff has failed to establish any of the other *Winter* factors required for a preliminary injunction. Plaintiff argues only that those factors are present because, purportedly, Plaintiff will likely succeed on its First Amendment claim. However, because that claim fails on the merits, Plaintiff has suffered no irreparable harm and the balance of the equities and public interest favor Defendant.

For these reasons, explained in detail below, the Court should deny Plaintiff's motion for preliminary injunction.

BACKGROUND

I. BACKGROUND ON ASSEMBLY BILL 587

Social media platforms, such as Plaintiff X Corp., have terms of service, including content-moderation rules, to which individuals must agree as a condition of using the platform. *See, e.g.*, *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1172 (N.D. Cal 2022), *aff'd sub. nom*. *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023). These rules give the platform the right to take action against content or users that violate the rules. *Id*. at 1186. In recent years, content moderation by social media companies has drawn public concern, with numerous lawsuits filed by users whose accounts were limited or suspended for posting content that violated the platforms' rules. *See, e.g., Informed Consent Action Network v. YouTube, Inc.*, 582 F. Supp. 3d (N.D. Cal. 2022); *Yuksel v. Twitter, Inc.*, No. 22-cv-05415-TSH, 2022 WL 16748612 (N.D. Cal. Nov. 7, 2022); *King v. Facebook, Inc.*, 572 F. Supp. 3d 776 (N.D. Cal. 2021); *Murphy v. Twitter, Inc*, 274 Cal. Rptr. 3d 360 (Ca1. Ct. App. 2021). Some states have passed laws prohibiting social media platforms from moderating, restricting, or otherwise limiting particular kinds of content. *NetChoice, LLC v. Att'y Gen.*, 34 F.4th 1196, 1205-1206 (11th Cir. 2022), *cert. granted in part sub. nom*. *Moody v. Netchoice*, --- S.Ct. ----, 2023 WL 6319654 (describing Florida statute) ("*Netchoice (Fla.)*"); *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445-446 (5th Cir. 2022), *cert. granted in part*, --- S.Ct. ----, 2023 WL 6319650 (describing Texas statute) ("*Netchoice (Tex.)*").

In marked contrast, California's AB 587 does not regulate content-moderation policies or decision-making by private social

media platforms. Instead, it is "a transparency measure." Boutin Dec., Ex. 2 at 4 (Assem. Judiciary Comm. Analysis). The law merely requires social media companies, as defined, to post their terms of service and to submit semiannual reports to the Attorney General about their terms of service and content moderation policies and outcomes. Cal. Bus. & Prof. Code §§ 22676, 22677. The Legislature's purpose was "to increase transparency around what terms of service social media companies are setting out and how it ensures those terms are abided by. The goal is to learn more about the methods of content moderation and how successful they are." Boutin Dec., Ex. 11 at 3 (Sen. Floor Analysis), Ex. 6 at 12 (Sen. Judiciary Comm. Analysis).

In other words, AB 587 is simply a disclosure statute intended to provide the public with information about large social media platforms' voluntarily content moderation policies and practices. *See* Cal. Bus. Prof. Code §§ 22676, 22677, 22678; *see also* Boutin Dec., Ex. 6 at 11-12 (Sen. Judiciary Comm. Analysis). It allows users to know "what social media platforms do to flag and remove certain kinds of content, which may affect what sites users prefer to use," and "what kind of content or conduct could lead to their being temporarily or permanently banned from using the social media service." Boutin Dec., Ex 2 at 4 (Assem. Judiciary Comm. Analysis). The Legislature also considered that, by requiring greater transparency about platforms' content-moderation rules and decisions, AB 587 may encourage—though not require—social media companies to "become better corporate citizens by doing more to eliminate hate speech and disinformation" on their platforms. *Id*.

II. TEXT OF ASSEMBLY BILL 587

AB 587 was enacted in September 2022 and is codified at California Business and Professions Codes sections 22675-22681. AB 587 provides that, commencing January 1, 2024, social media companies, as defined in the statute,[1] must post the terms of service for each social media platform owned or operated by the company "in a manner reasonably designed to inform all users of the social media platform of the existence and contents of the terms of service." *Id.* § 22676(a). The posted terms of service must contain a "description of the process users must follow to flag content, groups, or other users that they believe violate the terms of service," "the social media company's commitments on response and resolution time," and a "list of potential actions the social media company may take against an item of content or a user." *Id.* § 22676(b).

The social media companies also must, commencing January 1, 2024, submit to the Attorney General a semiannual "terms of service report" containing specific factual information. *Id.* § 22677(a)-(b). The reports must include the "current version of the platform's terms of service" and a "detailed description of content moderation practices used by the social media company …." *Id.* § 22677(a)(1), (a)(4). The reports must also include a statement of "whether the current version of the terms of service define each of the following categories of content, and, if so, the definitions of those categories," and "any existing policies

[1] AB 587 defines "social media company" as a person or entity that owns or operates one or more "social media platforms." Cal. Bus. & Prof. Code § 22675(d). A "social media platform" is defined as a "public or semi-public internet-based service that has users in California and meets" specific criteria. *Id.* § 22675(e).

intended to address the categories," which are: "[h]ate speech or racism"; "[e]xtremism or radicalization"; "[d]isinformation or misinformation"; "[h]arassment"; and "[f]oreign political interference." *Id.* § 22677(a)(3), (a)(4)(A). Finally, the reports must include "information on content that was flagged by the social media company as content belonging to any of the categories," including the number of items of content that were "flagged" or "actioned" by the social media company, and how those items of content were "flagged" of "actioned," e.g., whether by company employees, artificial intelligence software, or users. *Id.* § 22676(a)(5), (a)(5)(B)(iv)-(v). The Attorney General is directed to compile all terms of service reports and make them available to the public in a "searchable repository on its official internet website." *Id.* § 22676(c).

AB 587 creates a civil penalty for certain violations of the reporting requirements, which are enforceable by certain law enforcement officials in a court of law. *Id.* § 22678. In assessing the amount of any penalty, "the court shall consider whether the social media company has made a reasonable, good faith attempt to comply with the provisions of this chapter.[2] *Id.* § 22678(c)(3). The law does not give the Attorney General the authority or discretion to assess or collect penalties outside of a court action. *See id.* § 22678.

Social media companies with annual gross revenues of less than $100 million are exempt from the statute's requirements.

[2] By the statute's plain terms, this determination is the responsibility of the "court." *Id.* § 22678(c)(3). AB 587 does *not* "afford[] the Attorney General unfettered discretion in deciding what constitutes a 'reasonable, good faith attempt to comply' or a 'material[] omi[ssion] or misrepresent[ation]" in the Terms of Service Report." *See* Pltf.'s Mtn., ECF No. 20, at 39.

Id. § 22680. Also exempt are platforms "for which interactions between users are limited to direct messages, commercial transactions, consumer reviews of products, sellers, services, events, or places, or any combination thereof." *Id.* § 22681.

Nothing in AB 587 requires social media companies to disclose the identities of or information about specific users. *See id.* §§ 22675-81. Nothing in AB 587 dictates the substantive content of social media companies' terms of service. *See id.* §§ 22675-81. Nothing in AB 587 requires that social media companies take, or prohibits them from taking, any action whatsoever against any item of content or user. *See id.* And nothing in AB 587 requires that social media companies' terms of service define any categories of content. *See id*.

LEGAL STANDARD

Injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits,that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "When the government is a party, these last two factors," balance of the equities and public interest, "merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014); *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (same). Analysis of the first factor (i.e., likelihood of success on the merits) is a "threshold inquiry," and thus if a

movant fails to establish that factor, the court "need not consider the other factors." *Azar*, 911 F.3d at 575.

ARGUMENT

I. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE AB 587 DOES NOT VIOLATE THE FIRST AMENDMENT

A. AB 587 Satisfies the *Zauderer* Test for Compelled Commercial Disclosures

As explained, AB 587 does not dictate content-moderation policies or decisions about any particular content or user on social media. It merely requires covered social media companies to post their content-moderation policies and procedures so users can see them, and to report information about their content-moderation policies and decisions to the Attorney General on a semi-annual basis, so he can make that report available on his official website, enabling consumers to compare different platforms. AB 587 is in the same mold as other consumer disclosure statutes, such as food labeling and truth-in-lending laws. To the extent it regulates speech by covered social media companies, it involves compelled commercial speech of purely factual and uncontroversial information, consistent with the First Amendment.

The standard for analyzing compelled disclosures in the context of commercial speech is the test established in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). *Zauderer* and its progeny reflect the unexceptional principle that "[t]he First Amendment does not generally protect corporations from being required to tell prospective customers the truth." *Nationwide Biweekly Admin. v. Owen*, 873 F.3d 716, 721 (9th Cir. 2017).

Circuit courts have applied *Zauderer* to disclosure regulations very similar to those at issue here. In addition to their content-moderation restrictions, the statutes at issue in *NetChoice (Fla.)* and *NetChoice (Tex.)* contained provisions requiring disclosures about content moderation policies and practices.[3] *NetChoice (Fla.)*, 34 F.4th at 1230; *NetChoice (Tex.)*, 49 F.4th at 485. In both cases, the required disclosures included terms of service and related information and, in *Netchoice (Tex.)* the disclosures also included "information about the Platforms' content management and business practices," and a report containing high-level statistics about their content-moderation activities. *NetChoice (Tex.)*, 49 F.4th at 485; *NetChoice (Fla.)*, 34 F.4th at 1230. The application of *Zauderer* is equally appropriate here.

"Under *Zauderer*, compelled disclosure of commercial speech complies with the First Amendment if the disclosure is reasonably related to a substantial governmental interest and is purely factual and uncontroversial." *CTIA – Wireless Assn. v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019) ("*CTIA*").

[3] In both cases, the Supreme Court has granted certiorari, but only in part. The Court will consider the statutes' provisions mandating particular content moderation practices, but will not consider the statutes' transparency provisions that are comparable to AB 587. *See Moody v. Netchoice*, --- S.Ct. ----, No. 22-277, 2023 WL 6319654, at *1 (U.S. Sept. 29, 2023) (identifying issues from United States' amicus brief for which certiorari was granted); *Netchoice, LLC v. Paxton*, --- S.Ct. ----, No. 22-555, 2023 WL 6319650 (U.S. Sept. 29, 2023) (same); Brief for the United States as Amicus Curiae, Nos. 22-277, 22-393, 22-555 (S.Ct. Aug. 14, 2023), at 2023 WL 5280330.

1. The disclosures required by AB 587 are purely factual and uncontroversial

The Ninth Circuit has explained that *Zauderer*'s factual and uncontroversial requirement is satisfied where the law in question does not "attempt[] to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein." *Envtl. Defense Ctr. v. U.S. E.P.A.*, 344 F.3d 832, 849 (9th Cir. 2003) (internal quotation omitted). "Uncontroversial" refers to the "factual accuracy of the compelled disclosure, not to its subjective impact on the audience." *CTIA*, 854 F.3d at 1117. *See, e.g.*, *Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229, 251 (2010) (upholding law requiring that certain bankruptcy lawyers disclose themselves as "debt relief agencies," despite law firm's argument that the term was "confusing and misleading"); *Nat'l Biweekly Admin. v. Owen*, 873 F.3d at 733 (upholding requirement that mortgage refinancing company disclose that its solicitations were not authorized by the lender); *CTIA*, 928 F.3d at 846-47 (upholding ordinance requiring cell phone retailers to disclose that cell phone use could cause exposure to "RF radiation" in excess of federal safety guidelines, notwithstanding argument that term was "fraught with negative associations").

AB 587's required disclosures related to specified categories of content ("disinformation," "hate speech," etc.) are factual and uncontroversial.[4] *See* Cal. Bus. & Prof. Code §§ 22677(a)(3),

[4] AB 587's disclosure requirements related to specified categories of content are the only provisions of the bill that Plaintiffs argue are not "factual and controversial" under *Zauderer*. *See* Mtn. at 65-67.

(5)(B)(1). Those provisions merely require companies to disclose *whether* their terms of service "define" specified categories of content (and what those definitions are) and, *if so*,"[i]nformation on content that was flagged by the social media company as content belonging to any of" those categories. *Id.* § 22777(a)(3), (5)(B)(1). This is purely factual information about the company's actual policies and actual conduct, whose accuracy is not subject to factual controversy. If a social media company's terms of service do not define the categories listed in AB 587 in its terms of service, its report to the Attorney General would simply disclose that fact. Likewise, if a social media company does not moderate—or "flag"—content meeting its own definitions of those categories, it would have no numerical data on that subject to include its report. *See id*.

AB 587's category-related requirements are not controversial merely because the proper definition of those categories may be publicly debated or because Plaintiff elects to utilize different content categories that may overlap with those listed the statute. *See* Mtn. at 30, 35. AB 587 does not require a company to define any category at all in its terms of service, nor to take any position on the proper definition of the categories listed in the statute. For example, it does not require Plaintiff to define "disinformation" in its terms of service. And, if Plaintiff nevertheless chooses to do so, the law does not dictate what that definition should be. AB 587 only requires Plaintiff to disclose whether it has elected to define each category in its terms of service and, if so, what that definition actually is. While Plaintiff may not wish to disclose such

definitions for fear of the "subjective impact on its audience," that does not render the requirement controversial under *Zauderer*. *CTIA*, 854 F.3d at 1117.

AB 587's category-related requirements also do not compel statements that are misleading to consumers. See Mtn. at 66. Plaintiffs argue that these requirements could mislead the public into believing that the company is not sufficiently moderating content because the company chooses to utilize categories different than those in the statute. Mtn. at 66. This is quite unlikely. AB 587 requires the Attorney General to make public the entire terms of service report submitted by each company, not merely the company's statements on the categories in isolation. Cal. Bus. & Prof. Code § 22677(c). The terms of service reports must include the entire "current version of the terms of service of the social media platform." *Id.* § 22677(c)(1). The reports also must include a "detailed description of content moderation practices used by the social media company for that platform." *Id.* § 22677(c)(4). The bill does not limit how a company may explain or qualify these practices. *Id.* (description must include, but is "not limited to" certain subjects). Thus, AB 587's disclosure requirements allow companies to make clear what

they are actually doing to moderate content. It does not compel Plaintiff to make misleading statements.[5]

2. AB 587 is reasonably related to a substantial state interest

AB 587 also meets the second part of the *Zauderer* test, because it is "reasonably related to a substantial governmental interest." *CTIA*, 928 F.3d at 845. California has a substantial interest in requiring social media companies to be transparent about their content-moderation policies and decisions so that consumers can make informed decisions about where they consume and disseminate news and information. *See Netchoice (Fla.)*, 34 F.4th at 1230; *Netchoice (Tex.)*, 49 F.4th at 485; *see also, e.g., Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 540-41 (D.C. Cir. 2020) (upholding statute requiring hospitals to disclose pricing information, "to achieve goal of informing consumers about a particular product trait") (quoting *Am. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc); *Nat'l Elec. Mfrs. Assn. v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2011) (rejecting challenge to regulation requiring disclosure of information concerning mercury-containing products "to better inform consumers about the products they purchase"). The goal of AB 537 was to advance this interest. Boutin Dec., Ex. 6 at 12 (Sen. Judiciary Comm. Analysis), Ex. 2 at 4 (Assem. Judiciary

[5] Plaintiff also briefly asserts in this section of its brief that *Zauderer* does not apply here because that test applies only to "instances of 'commercial advertising'." Mtn. at 66 (citing *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2372 (2018) ("*NIFLA*")). However, *NIFLA* did not purport to narrow *Zauderer* to compelled speech in commercial advertisements (*id.*) and, indeed, the Ninth Circuit subsequently applied the test to compelled commercial disclosures that were not advertisements (*CTIA*, 928 F.3d 832 (applying *Zauderer* to ordinance requiring cell phone retailers to inform prospective purchasers regarding cell phone radiation)).

Comm. Analysis). And, AB 587 does advance that interest, by requiring companies to disclose and explain their terms of service, Cal. Bus. Prof. Code §§ 22676, 22677, and to report high-level information about their content moderation practices, *id.* §22677(a)(4)-(5).

The statute at issue in *NetChoice (Fla.)*, 34 F.4th at 1230, contains provisions requiring that social media platforms "publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban," and that they inform users about changes to their terms of service before implementing them. *Id*. On an appeal from an order granting a preliminary injunction, the Eleventh Circuit held that the statute's content-moderation restrictions were likely unconstitutional, but Florida's interest in requiring social media platforms to publish their content-mediation standards was likely legitimate, because it ensures that "consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum—are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation." *Id*. Similarly, the Texas statute at issue in *NetChoice (Tex.)* contains provisions requiring large social media platforms to "publish an acceptable use policy and disclose information about the Platforms' content management and business practices," and publish a report containing high-level statistics about their content-moderation activities. 49 F.4th at 485. Despite the law's other problems, there was no dispute that its disclosure requirements "advance the state's interest in enabling

users to make an informed choice regarding whether to use the Platforms." *Id.* (cleaned up). Here, AB 587 provides similar transparency and is similarly constitutional under *Zauderer*.

The California Legislature also considered that, by requiring greater transparency about platforms' content-moderation rules and decisions, AB 587 may encourage—*though not require*—social media companies to "become better corporate citizens by doing more to eliminate hate speech and disinformation" on their platforms. Boutin Dec., Ex. 2 at 4 (Assem. Judiciary Comm. Analysis). This, too, is a substantial state interest.[6] However, Plaintiff's contention that the Legislature intended to use AB 587 to "squelch" disfavored speech (*see* Mtn. at 9-10) fails in the face of the plain text and the history of the bill. Both show that the Legislature took pains to ensure that AB 587 "*does not require* social media companies to moderate or remove hateful or incendiary content." Boutin Dec., Ex. 2 at 4 (Assem.

[6] The Legislature was concerned that "social media has become a powerful and largely unregulated platform for groups espousing hate, violence, bigotry, conspiracy theories and misinformation." Boutin Dec., Ex. 2 at 4 (Assem. Judiciary Comm. Analysis). Use of social media has ballooned from only five percent of adults in 2005 to over 70 percent of adults in 2022. *Id.*, Ex. 6 at 1. (Sen. Judiciary Comm. Analysis) During that time, social media companies' content-moderation policies have dramatically evolved; at the same time, "proliferation of objectionable content and 'fake news' has led to calls for swifter and more aggressive action in response." *Id*. The legislative history notes that a recent study of Twitter posts determined that "more targeted, discriminatory tweets posted in a city related to a higher number of hate crimes." *Id.*, Ex. 10 at at 3 (Sen. Floor Analysis); *see id.*, Ex 2 at 4. The Legislature also was concerned that social media companies were deploying a number of methods of content moderation, but there was a lack of transparency into those methods, *id.*, Ex. 6 at 11 (Sen. Judiciary Comm. Analysis), and recognized "backlash against perceived censorship in response to filtering of content and alleged 'shadow banning,'' Ex. 10 at 3 (Sen. Floor Analysis).

Judiciary Comm. Analysis) (emphasis added).[7] *See also infra* at pp. 3-7.

In sum, AB 587's "[m]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" *Nat'l Elec. Mfrs. Assn. v. Sorrell*, 272 F.3d at 113-114.

3. AB 587 is not unjustified or unduly burdensome

A disclosure requirement could violate the First Amendment if it was so "unjustified or unduly burdensome" that it "chill[s] protected commercial speech." *Zauderer*, 471 U.S. at 651. *See CTIA*, 928 F.3d at 848–49; *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d at 27 ("*Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally protected speech"). Plaintiff has not shown that AB 587 is such a requirement.

[7] In an attempt to demonstrate that AB 587's purpose is to suppress protected speech, Plaintiff cites a public letter from the Attorney General. As explained below in further detail, *infra* at pp. 35-36, Plaintiff's characterization of this letter is not accurate. In any event, the letter is not part of the bill's legislative history. *See Am. Fuel & Petrochem. Mfrs. v. O'Keefe*, 903 F.3d 903, 912 (9th Cir. 2018) (holding that the district court correctly found that statements by public officials "do not demonstrate that objectives identified by the legislature were not the true goals" of the statute). Moreover, under California law, legislative history consists of materials relating to the bill that the Legislature as a body had before it when it deliberated over the bill. *Noori v. Countrywide Payroll & HR Solutions, Inc.*, 257 Cal. Rptr. 3d 102, 110 n. 11 (Cal. Ct. App. 2019). The statements Plaintiff cites were not before the Legislature and, rather, post-date the Legislature's vote.

AB 587 applies only to social media platforms that gross over $100 million in revenue per year. Cal. Bus. & Prof. Code § 22680. It merely requires a subject company to make their terms of service available to users and to submit semiannual reports to the Attorney General on their terms of service and content moderation policies and outcomes. *Id.* §§ 22676, 22677. The law does not require companies to utilize any particular content categories in their terms of service or actual content moderation practices, nor to report on any flagged posts in categories that they do not utilize. *See id.* §§ 22676(a)(3) (report to Attorney General must include a "statement of *whether* the current version of the terms of service defines each of the following categories . . ." (emphasis added)), 22677(a)(5)(A) (report must include "[i]nformation on content that *was* flagged by the social media company as content belonging to any of the categories described in paragraph (3) . . ." (emphasis added)).

Plaintiff is subject to AB 587 because it grosses over $100 million per year. Redacted Affidavit, ECF No. 23, ¶ 5; Cal. Bus. & Prof. Code § 22680. Plaintiff's contention that, despite this high revenue, compliance with AB 587 would entail "herculean" efforts (Mtn. at 67) appears to rely on a misapprehension of the statute and is not supported by facts. Plaintiff argues that it would be "enormously burdensome to create and categorize the records required by AB 587 for the roughly 221 billion posts made on X each year." Mtn. at 68. But AB 587 does not require Plaintiff to categorize all of its posts. It only requires Plaintiff to report certain statistics on *flagged* posts *if* Plaintiff already utilizes the categories enumerated in the

statute. *Id.* § 22677(a)(5)(A). Plaintiff has submitted no evidence of the cost or burden of what the statute actually requires it to do, nor how that would cause chilling of protected speech. *See NetChoice (Tex)*, 49 F.4th at 486 ("*Zauderer* does not countenance a broad inquiry into whether disclosure requirements are 'unduly burdensome' in some abstract sense, but instead instructs us to consider whether they unduly burden (or 'chill') protected speech and thereby intrude on an entity's First Amendment speech rights"). Just as the Fifth Circuit concluded when evaluating the burden of the Texas law requiring social media companies to report high-level content moderation statistics, "[a]t best, [plaintiffs have] shown that *some* of the transparency report's disclosures, *if* interpreted in a particularly demanding way by [the state], *might* prove unduly burdensome due to unexplained limits on the Platforms' technical capabilities. But none of these contingencies have materialized." *Id.* at 486. Indeed, here, Plaintiff appears to maintain that it does not, in fact, utilize the categories in AB 587. Red. Affid., ¶ 13 ("But X Corp.'s categories of content moderation, while comprehensive, do not align with the categories identified in the statute"); *see also* Mtn. at 30-35 (describing X Corp. terms of service categories). If that is the case, then AB 587's disclosure requirements regarding statistics on flagged items will cause it no burden at all because Plaintiff just simply state in its report to the Attorney General that it does not use the categories. *See* Cal. Bus. & Prof. Code § 22677(a)(5)(A) (requiring disclosure only of "[i]nformation on content that was flagged by the social media company as content

belonging to any of the categories described in paragraph (3)" (emphasis added)).

Finally, AB 587's enforcement mechanism does not unduly burden Plaintiff, and is certainly not "draconian." Mtn. at 39. To enforce the law, the Attorney General or other appropriate state official must bring a court action to adjudicate a possible violation of the law. Cal. Bus. & Prof. Code § 22678(b). According to AB 587's plain text, it is "the court," not the Attorney General that has the discretion to determine "whether the social media company has made a reasonable, good faith attempt to comply with" AB 587. *Id.* § 22678(a)(3). Plaintiff also suggests that the law is unduly burdensome because the Attorney General has some sort of unusual investigatory powers to enforce it. Mtn. at 40. This is not so. AB 578 confers no particular investigatory powers on the Attorney General. Accordingly, Plaintiff cites only a provision of the California Government Code that governs all state agencies' general powers to conduct investigations and hearings. *Id.* (citing Cal. Gov. Code § 11180).

Because AB 587 satisfies the *Zauderer* test for compelled commercial speech and is not so unjustified or unduly burdensome as to chill protected speech, the law does not violate the First Amendment. The Court need not inquire further to conclude that Plaintiff's First Amendment claim is not likely to succeed on the merits and the motion for preliminary injunction should be denied.

B. Even if the AB 587 Did Not Satisfy the *Zauderer* Test, It Would Still Be Constitutional Under *Central Hudson* Intermediate Scrutiny

Even if AB 587 did not satisfy the *Zauderer*, it would still be constitutional under the *Central Hudson* intermediate scrutiny test for commercial speech. *See Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1258 (E.D. Cal. 2020) ("If the *Zauderer* standard does not apply here because the warning requirement is not purely factual and uncontroversial . . . the court should then proceed to examine the warning requirement under *Central Hudson*'s intermediate scrutiny") (citing *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2372 (2018) ("*NIFLA*") (internal quotation omitted)); *California Chamber of Commerce v. Becerra*, 529 F. Supp. 3d 1099, 1121-22 (E.D. Cal. 2021) (assuming without deciding that *Central Hudson* analysis should be applied if regulation compelling commercial speech does not satisfy *Zauderer*); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

Under *Central Hudson*, government regulation of commercial speech will be upheld so long as: (i) the government asserts a substantial interest, (ii) the regulation directly advances the government's asserted interest, and (iii) the regulation is no more restrictive than necessary to serve that interest. *See Central Hudson*, 447 U.S. at 564.

When applying intermediate scrutiny, courts give "substantial deference to the predictive judgments of [the legislature]." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotation and citation omitted); *see also United States*

v. Edge Broad. Co., 509 U.S. 418, 434 (1993) ("Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments"). The legislature may rely on evidence "reasonably believed to be relevant to the problem" (*id.* at 51) and such evidence need not be empirical (*see, e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (plurality opinion) (explaining that city did not need empirical data to support its conclusion that adult-bookstore ordinance would lower crime)).[8]

1. AB 587 serves a substantial government interest

As discussed above in the context of *Zauderer* scrutiny, AB 587 serves California's substantial interest in social media transparency regarding their content-moderation policies and decisions, so that consumers can make informed decisions about which platforms they use to gather and disseminate information. *See supra* at pp. 13-16; *see also NetChoice (Fla.)*, 34 F.4th at 1230 (recognizing that state disclosure requirements on social media platforms' content management serves substantial state interest); *NetChoice (Tex.)*, 49 F.4th at 485 (same). The first prong of *Central Hudson* scrutiny is satisfied.

[8] Plaintiff briefly asserts in a footnote that *Central Hudson* scrutiny does not apply here because AB 587 does not regulate commercial speech. Factors in deciding whether speech constitutes "commercial speech" include whether (1) the speech is an advertisement; (2) the speech refers to a particular product; and (3) the speaker has an economic motivation. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983)). These factors are not dispositive, and not all of them "must necessarily be present in order for speech to be commercial." *Bolger*, 463 U.S. at 67, n.14. Factual disclosures from social media companies about their user policies and practices are commercial speech, because they relate to a "particular product" (i.e., the platforms) and are made with the economic motivation for people to elect to properly utilize those platforms.

2. AB 587 directly advances the government's asserted interest

The second *Central Hudson* prong is also easily satisfied. For this requirement, a state must show "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 762 (1993). Nevertheless, "empirical data [need not] come . . . accompanied by a surfeit of background information," and such restrictions may be "based solely on history, consensus, and simple common sense." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quotation marks omitted).

As explained above, AB 587 directly advances the state's interest in ensuring transparency in social media companies' content moderation policies and practices. *See supra* at pp. 13-16. The need for this transparency is real and not hypothetical. An article from the MIT Technology Review, cited in the Legislative history, explains, "social media has become the terrain for a low-grade war on our cognitive security, with misinformation campaigns and conspiracy theories proliferating." Joan Donovan, *Why social media can't keep moderating content in the shadows*, MIT TECHNOLOGY REVIEW, November 6, 2020, available at https://www.technologyreview.com/2020/11/06/1011769/social-media-moderation-transparency-censorship/ (last viewed Oct. 27, 2023); Boutin Dec., Ex. 6 at 11 (Sen. Judiciary Comm. Analysis). However, social media platforms "rarely provide detailed insight: into their content moderation practices." *Id.* at 12.

Plaintiff appears to argue that AB 587 does not directly advance the state's interest in increasing the transparency of

social media content moderation because X Corp. is already sufficiently transparent by posting its terms of service. Mtn. at 64. That fact does not mean that AB 587 does not directly advance the state's interest in *increasing* transparency (and even maintaining the low levels of current transparency) to help the public make informed choices about where to obtain and disseminate news and information. Better transparency under SB 587 includes information about what actions social media platforms *actually* take to enforce their terms of service and moderate their content. *See* Cal. Bus. & Prof. Code § 22677(a)(4)-(5). In any event, a statute does not violate the First Amendment merely because one company may currently comply with parts of it voluntarily.

3. AB 587 is not "more extensive that necessary" to serve the government's asserted interest in transparency

Plaintiff does not argue that AB 587 is "more extensive than necessary" to serve the State's asserted interest. *Central Hudson*, 447 U.S. at 564; *see* Mtn. at 63-65. Indeed, the law satisfies that final prong of *Central Hudson*.

A restriction on commercial speech must also not be "more extensive than necessary to serve the interests that support it." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999). "The test is sometimes phrased as requiring a reasonable fit between government's legitimate interests and the means it uses to serve those interests." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 825 (9th Cir. 2013) (internal quotation omitted). The law need "not necessarily [be] the single best disposition but one whose scope is in proportion

to the interest served . . . ." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). So long as a statute falls within those bounds, courts "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

The disclosure requirements in AB 587 are a "reasonable fit" with the state's interest in ensuring transparency in social media companies' content moderation policies and practices. Its scope is modest and its burden on large, well-resourced social media companies is minimal because, rather than prescribe any terms of service or content moderation practices, the law merely requires companies to disclose their terms of service and generally report on what they are already doing to moderate content. AB 587 is therefore no more extensive than necessary in relation to its purpose creating public transparency.[9]

C. AB 587 Does Not Violate the First Amendment Based on Plaintiff's "Editorial Judgments" Theory

Plaintiff appears to argue that, regardless of whether AB 587 satisfies *Zauderer*, the law categorically violates the First Amendment based on a theory that it interferes with Plaintiff's "editorial judgments about content." Mtn. at 46. This argument is unavailing here, just as it was in *Netchoice (Fla.)* and

[9] The disclosure requirements of AB 587 are generally severable for the purposes of an injunction because they are "grammatically, functionally, and volitionally separable." *Cal. Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 271 (2011); *Project Veritas v. Schmidt*, 72 F.4th 1043, 1063 (9th Cir. 2023) ("To determine whether a state statute is severable, we are bound by state statutes and state court opinions"). Thus, even if this Court were to find that AB 587 likely violates the First Amendment, the Court should only consider preliminarily enjoining the specific provisions of AB 587 that the Court concludes are likely unconstitutional.

Netchoice (Tex.), where both the Fifth and Eleventh Circuits held that the challenged disclosure statutes did not violate the First Amendment based on the "editorial judgments" theory. *Netchoice (Fla.)*, 34 F.4th at 1233; *Netchoice (Tex.)*, 49 F.4th 487-88. Indeed, none of Plaintiffs' cited cases involve regulations compelling commercial speech and therefore none even consider whether *Zauderer* should apply.

Herbert v. Lando is a defamation case that merely says, in dicta, that "[t]here is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed." 441 U.S. 153, 174 (1979). The Fifth Circuit explained in *Netchoice (Tex.)* why *Herbert* is distinguishable from social media transparency laws: "*Herbert* held that a defamation plaintiff could obtain discovery into the editorial processes that allegedly defamed him. And in the course of so holding, the Court rejected the editor's request to create 'a constitutional privilege foreclosing direct inquiry into the editorial process.'" *Netchoice (Tex.)*, 49 F.4th at 487 (quoting *Herbert*, 441 U.S. at 176) (internal citation omitted). Moreover, here and in *Netchoice (Tex.)*, the *Zauderer* test accounts for the hypothetical scenario asserted in *Herbert* by requiring compelled commercial speech to be purely factual and to reasonably relate to a particular substantial governmental interests—the disclosures are not required "merely to satisfy mere curiosity." *Herbert*, 441 U.S. at 176.

In *Miami Herald Pub. Co. v. Tornillo*, the Supreme Court ruled that a Florida statute violated the First Amendment by requiring a newspaper that criticized a political candidate to subsequently publish the candidate's response. 418 U.S. 241, 244 (1974); *see* Mtn. at 47. The Court reasoned that, under the First Amendment, the state could not compel a newspaper to publish political speech that it disagreed with. *Id.* at 256 ("the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which reason tells them should not be published is unconstitutional"); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (*Miami Herald* "rests on the principle that the State cannot tell a newspaper what it must print").

The challenged statute in *Miami Herald* is clearly distinguishable from AB 587. An analogous law would require social media platforms to publish on the platform noncommercial content that it did not wish to publish. But AB 587 does not compel or prohibit the publication of any noncommercial content—it does not purport to regulate what posts a social media platform must allow or disallow. AB 587 merely requires companies to disclose their terms of service (i.e., commercial speech) and report to the Attorney General certain high level information about how the company voluntarily elects to limit its content. Unlike the statute in *Miami Herald*, AB 587 therefore

does not dictate companies' editorial judgments about what is included on their platforms.[10]

Washington Post v. McManus is also distinguishable. *See* 944 F.3d 506 (4th Cir. 2019); *see also Paxton*, 49 F.4th at 488, n.38. That case involved burdensome campaign finance regulations of political speech. *Id.* at 510-12. Specifically, the law required online platforms (include news outlets) to, for every political ad it posted, also post on its site "the identity of the purchaser, the individuals exercising control over the purchaser, and the total amount paid for the ad." *Id.* at 511. It also required platforms to collect and retain records regarding the political ad purchasers, which was subject to state inspection. *Id.* at 512. While expressly noting the narrowness of its ruling (*id.* at 513), the court emphasized that the regulatory scheme was unconstitutional, in large part, because it singled out political speech, "campaign-related speech," for regulation. *Id.* at 513-14. It also emphasized that the law implicated constitutional protections for anonymous political speech (*id.* at 515) and that noncompliance would result in an injunction to remove the political ad and, failing that, criminal penalties (*id.* at 514).

AB 587 does not implicate these concerns. It does not require social media platforms to respond to political content

[10] The editorial judgment theory also does not apply to AB 587 due to material differences between newspapers and social media platforms. *See* Br. of Amicus Curiae the Knight First Amendment Institute at Columbia University in Support of Pltfs.-Appellees, *Netchoice LLC v. Atty Gen., St. of Fl.*, No. 21-12355 (11th Cir. Nov. 15, 2021), 2021 WL 5358576 at *18-22 (describing differences that should inform First Amendment analysis); *Netchoice (Tex.)*, 49 F.4th at 488 ("[social media p]latforms, of course, neither select, compose, nor edit (except in rare instances after dissemination) the speech they host. So even if there was a different rule for disclosure requirements implicating a newspaper-like editorial process, that rule would not apply here because the Platforms have no such process").

posted on their platforms with speech of their own. It merely requires them to disclose facts about their commercial services—namely their terms of service, and high-level information on their content moderation practices—so that consumers can take that information into account in deciding whether to use that service. And, unlike the challenged law in *Washington Post*, AB 587 does not provide any penalties based on the content on the platform.

Because their cited cases are inapposite, Plaintiffs have failed to show that the "editorial judgment" theory, and not *Zauderer*, applies to AB 587.

D. AB 587 Is Not Subject to Strict Scrutiny, But Satisfies It In Any Event

1. *Zauderer*, not strict scrutiny, applies to laws compelling commercial speech, even if content-based

AB 587 requires qualifying social media platforms to disclose specified factual information. This does not subject the law to strict scrutiny.

Generally, many content-based speech regulations implicating the First Amendment are subject to strict scrutiny. However, as the Supreme Court explained in *NIFLA*, *Zauderer* set forth an exception to this rule for content-based regulations that compel commercial speech. *NIFLA*, 138 S. Ct. at 2365-66 (citing *Zauderer*, 471 U.S. at 651). Indeed, regulations compelling speech are usually content-based by definition, because they set forth some category of information that must be spoken—and *Zauderer* scrutiny is applied in those cases. *See, e.g.*, *Zauderer*, 471 U.S. at 652 (attorney advertisements required to

disclose that clients may be responsible for litigation costs); *CTIA*, 928 F.3d at 837-38 (cell phone retailers required to inform prospective purchasers about cell phone radiation); *Am. Beverage Ass'n v. City and County of San Francisco*, 916 F.3d 749, 753 (9th Cir. 2019) (health warnings required in advertisements for certain sugar-sweetened beverages).

Plaintiff argues that, as a content-based regulation, AB 587 is subject to strict scrutiny because the law requires disclosures that are not "purely factual and uncontroversial." However, as explained above, that is not the case. *Supra* at pp. 10-13. *Zauderer* scrutiny therefore applies, and AB 587 satisfies it.

Volokh v. James is not analogous to the circumstances here. *See* --- F.Supp.3d ----, No. 22-cv-10195, 2023 WL 1991435, (S.D.N.Y. Feb. 14, 2023); *see* Mtn. at 53. In *Volokh*, the challenged law required social media platforms to both have and disclose a policy regarding hate speech, specifically. *Id.* at *2. The court found that the law placed plaintiffs "in the incongruous position of stating that they promote an explicit pro-free speech ethos, but also require[d] them to enact a policy allowing users to complain about 'hateful conduct' as defined by the state." *Id.* at *7. The court concluded that the compelled speech was therefore partly political in nature and that strict scrutiny was therefore appropriate." *Id.*

In contrast here, AB 587 does not force Plaintiff to have any policy or take any position on any type of speech, because it does not require Plaintiff to utilize any particular categories in its terms of service or for the purposes of content

moderation. The law merely requires Plaintiff to disclose the factual information of whether it does, in fact, define certain categories in its terms of service, and high-level statistics on its actual content moderation practices. The law therefore requires Plaintiff to disclose factual information about its own voluntary, existing practices and is not subject to strict scrutiny.

2. Plaintiff's "speech about speech" cases do not apply here

AB 587 is also not subject to strict scrutiny as a law that purportedly regulates "speech about speech." Mtn. at 54. Plaintiff's cited cases do not support the application of that theory here.

Smith v. People of the State of California did not involve compelled commercial speech, but rather, an ordinance imposing strict criminal liability on booksellers containing obscene material. 361 U.S. 147, 148-49 (1959). The Court concluded that the statute would have the functional effect of banning books that were not obscene, and thus, constitutionally protected. *Id.* at 152. AB 587 is not analogous to the ordinance in *Smith*. It does not functionally require Plaintiff to change its terms of service or content moderation practices; it merely requires Plaintiff to disclose them. The law is not unconstitutional merely because the public may not have a wholly positive reaction to those disclosures.

In *Entertainment Software Ass'n v. Blagojevic*, the Seventh Circuit considered a challenge to an Illinois law that required video game retailers to label any "sexually explicit" video game

with the numeral "18." 469 F.3d 641, 643 (7th Cir. 2006). The law also required retailers to "place a sign in their stores explaining the video game rating system and to provide customers with brochures about the video game rating system." *Id.* The court initially applied *Zauderer*, but determined that the laws' particular requirements were not "purely factual" or "uncontroversial" because both compelled disclosures were subjective and "opinion-based" according to the content of the video games. *Id.* at 652-63. That is why the court then turned to strict scrutiny. Meanwhile, in *Motion Picture Ass'n of Am. v. Specter*¸ which predated *Zauderer*, the district court held that a state law violated the First Amendment where it criminalized a film exhibitor's misrepresentation that a film is "suitable for family viewing," reasoning that the standard was entirely subjective. 315 F.Supp. 824, 825-26 (E.D. Penn. 1970).

Here, AB 587's requirements meet the *Zauderer* standard, because the disclosures are factual and uncontroversial. The law does not require companies to categorize content in any particular way, but merely requires them to report on the categories they already elect to use, which is a factual matter. In other words, the law also does not require social media companies to adopt, adhere to, or endorse any government definition of harmful or otherwise disfavored speech.

3. AB 587's legislative purpose does not subject the statute to strict scrutiny

Plaintiff appears to argue that statements by public officials indicate that the law is a content-based and viewpoint-

discriminatory regulation, and therefore subject to strict scrutiny. Mtn. at 55-58.

As previously discussed, just like most laws compelling commercial speech, AB 587 is content based. *See supra* at pp. 28-29. But that subjects the bill only to *Zauderer* scrutiny. *See Zauderer*, 471 U.S. at 652. Although Plaintiff cites *Reed* and *City of Austin* for the proposition that content-based regulations are subject to strict scrutiny, those case involved restricted speech not compelled speech. Mtn. at 56-57; *see Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 159 (2015); *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 64-65 (2022).

AB 587 is, however, viewpoint neutral (and not viewpoint-discriminatory), both facially and considering its legislative history and purpose. "A regulation engages in viewpoint discrimination when it regulates speech 'based on 'the specific motivating ideology or perspective of the speaker.' " *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017) (quoting *Reed*, 576 U.S. at 168). If a law is facially neutral, a court "will not look beyond its text to investigate a possible viewpoint-discriminatory motive." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018). A court may only turn to the legislative history and other extrinsic evidence of legislative intent if the law includes "indicia of discriminatory motive." *Id.*

The text of AB 587 is facially neutral and there are no indicia in the text of discriminatory motive. It does not impose any terms of service or content regulation policies on any social

media platform. The law merely requires the companies to disclose the policies and practices that it has already, voluntarily, put into place. It therefore does not favor any disclosures over others. This Court therefore need not look beyond the state's text to conclude that it is viewpoint-neutral, and therefore not subject to strict scrutiny.

Even if it were appropriate to look beyond AB 587's text, the legislative history establishes that the law is not viewpoint discriminatory. Courts "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [the courts] to conclude that they could not have been a goal of the legislature." *Am. Fuel & Petrochem. Mfrs. v. O'Keefe*, 903 F.3d 903, 912 (9th Cir. 2018). As the Legislature put it, AB 587 is, "[i]n essence . . . a transparency measure." Boutin Dec., Ex. 2 at 4 (Assem. Judiciary Comm. Analysis). The Legislature's express purpose in enacting the bill was "to increase transparency around what terms of service social media companies are setting out and how it ensures those terms are abided by. The goal is to learn more about the methods of content moderation and how successful they are." *Id.*, Ex. 6 at 12 (Sen. Judiciary Comm. Analysis). The Governor's press release following enactment prominently referred to AB 587 in its title as a "social media transparency bill." *See* Mtn. at 69.

Plaintiff argues that the main purpose of AB 587 is to pressure social media platforms to eliminate certain types of speech on their platforms. Mtn. at 55-56. The Legislature did

consider that, by requiring greater transparency about platforms' content-moderation rules and decisions, AB 587 may encourage—*though not require*—social media companies to "become better corporate citizens by doing more to eliminate hate speech and disinformation" on their platforms. Boutin Dec., Ex. 2 at 4 (Assem. Judiciary Comm. Analysis). But any *public* pressure from consumers that results from the factual disclosures does not equate to discriminatory treatment by the *state* through AB 587.

To hold otherwise would mean that strict scrutiny would presumably apply to any consumer protection law that forces a company to disclose unfavorable information about its product. That is not the rule under *Zauderer*. *See, e.g.*, *Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229, 251 (2010) (requiring bankruptcy lawyers to disclose themselves as "debt relief agencies") *Nat'l Biweekly Admin. v. Owen*, 873 F.3d at 733 (requiring mortgage refinancing company to disclose that its solicitations were not authorized by the lender); *CTIA*, 928 F.3d at 846-47 (requiring cell phone retailers to disclose information on cell phone radiation); *S.F. Apartment Ass'n v. City & Cnty. of S.F.*, 881 F.3d 1169, 1176-77 (9th Cir. 2018) (requiring landlords to provide tenants with information about tenants' rights organizations before engaging in lease buyout negotiations); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (requiring restaurants to post calorie content on menus); *see also Nationwide Biweekly Admin. v. Owen*, 873 F.3d 716, 721 (9th Cir. 2017) ("[t]he First Amendment does not generally protect corporations from being required to tell prospective customers the truth"). To the contrary, *Zauderer* does not

require a law's "subjective impact on the audience" to be "uncontroversial." *CTIA*, 854 F.3d at 1117.

4. AB 587's does not "lend itself to government coercion"

Finally, Plaintiff argues that strict scrutiny should apply to AB 587 because the bill "lends itself to impermissible government coercion" as a result of a post-enactment letter from the Attorney General, together with his routine investigatory powers and role in enforcing AB 587 in court. Mtn. at 59-60.

First, Plaintiff does not accurately represent the letter from the Attorney General. The letter was sent to five of the largest social media companies, including Plaintiff, shortly before the November 2022 mid-term elections. Exh. 1 to Fernandez Dec., ECF No. 18-3, at 1-2. Its legitimate purpose was to encourage the companies to take steps to "stop the spread of disinformation and misinformation that attack the integrity of our electoral processes." *Id.* at 2. The Attorney General sent this message in his role as the state official in charge of protecting Californians' right to vote and out of concern for widespread online election misinformation that deters and disenfranchises voters. *Id.* The eight-page letter briefly mentions AB 587 only once, and even then only as one of the state's numerous laws that protect voters from disenfranchisement and election disinformation. *Id.* at 4. The letter then rightfully states that the Attorney General will enforce *all* of these laws. *Id.* Nowhere does the letter state that AB 587 would be enforced beyond the scope of its facial disclosure requirements. The letter does not constitute any attempt to

coerce Plaintiff to take any action related to AB 587 beyond those requirements, as even Plaintiff appears to concede. Mtn. at 59 ("AG Bonta has 'made clear' that X Corp. will 'suffer adverse consequences' if it 'fail[s] to comply' *with AB 587's disclosure requirements*" (emphasis added) (quoting letter).

Second, AB 587 does not confer on the Attorney General improper coercive powers merely because the Attorney General has general subpoena and investigatory powers and the power to initially determine when a social media platform as made a "reasonable, good faith attempt to comply" with AB 587's disclosure obligations. (Cal. Bus. & Prof. Code § 22678(a)(2)(C)) ; *see* Mtn. at 59-60. With respect to those powers, AB 587 is no different than any other valid state statute that the Attorney General enforces. As explained above, the subpoena and investigatory powers arise from the California Government Code and are general powers attendant to the office. Cal. Gov. Code § 11180; *see also* Mtn. at 40. Similarly, it is normal for the Attorney General to preliminarily determine that a statute has been violated before initiating a court action for a trier of fact to adjudicate the dispute and assess any appropriate penalties.

AB 587 does not give rise to any improper government coercion and is not subject to strict scrutiny.

5. In any event, AB 587 satisfies strict scrutiny

Even if AB 587 were subject to strict scrutiny, it would satisfy that level of review because it serves a compelling state interest and is narrowly tailored. *See Reed,* 576 U.S. at 171.

First, AB 587 serves a compelling interest—empowering the 70% of adults that use social media with information to allow them to navigate among the disinformation, threats, and hate speech that inevitably appears on social media platforms. This ability is essential to maintain an informed, enfranchised, and safe populace. Electoral integrity and public safety are compelling state interests. *See Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 538 (9th Cir. 2015) (holding that state's interest in electoral integrity, including combatting fraud and promoting transparency and accountability, was "undoubtedly important"); *Schall v. Martin*, 467 U.S. 253, 264 (1984) ("protecting the community from crime" is a compelling state interest);
Harbor Missionary Church Corp. v. City of San Buenaventura, 642 F. App'x 726, 730 (9th Cir. 2016) (The district court did not err in finding that the City had a compelling interest in promoting public safety and in preventing crime").

Second, AB 587 is also narrowly tailored. The law is minimally burdensome on social media companies. Unlike the challenged laws in *Netchoice (Fla.)* and *Netchoice (Tex.)*, AB 587 does nothing that regulates the speech *content*—by either users or the companies—on the social media platforms. Companies may regulate the content however they see fit. AB 587 merely requires the companies to disclose their existing terms of service and certain information about the manner in which they currently moderate content.

Plaintiff offers three proposals for how AB 587 could be more narrowly-tailored. Mtn. at 63. None would be sufficient to

serve the state's compelling interest here. First, the law cannot effectively apply only to companies "that do not disclose how content is moderated at all," *id.*, because this would set no minimum bar for the information that is disclosed to the public. Companies could disclose the bare minimum of information that is entirely useless to the public. Second, the law would not sufficiently serve its compelling purpose without its use of specific categories of conduct. *See id.* The subjects are commonly used in content moderation and provide points of comparison across platforms for the public. Third, AB 587 already satisfies Plaintiff's final proposal for narrow tailoring, because the law already does not "require [social media companies] to take positions on specific categories of controversial speech." *See supra* at p. 11; *see* Cal. Bus. & Prof. Code §§ 22676, 22677.

Thus, while strict scrutiny does not apply to AB 587, the law satisfies that level of review.

II. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF SUCCESS BECAUSE THE AB 587 IS NOT PREEMPTED BY SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

The Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230, provides internet companies with immunity from certain claims to further its policy "to promote the continued development of the Internet and other interactive computer services." *Id.* § 230(b)(1). Construing this immunity broadly, Plaintiff argues that AB 587's reporting requirements are in conflict with, and thus preempted by, the CDA's protections against liability for hosting "objectionable" third-party content on Plaintiff's platform. Mtn. at 71. Alternatively, Plaintiff

contends that AB 587 is inconsistent with the CDA's express preemption provisions. Plaintiff cannot prevail on the merits of its preemption claim under either theory.

A. Section 230 Does Not Conflict-Preempt AB 587

Section 230 of the CDA "protects certain internet-based actors from certain kinds of lawsuits." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009). In enacting section 230, Congress intended to serve "two parallel goals," *id.* at 1099: First, to "promote the free exchange of information and ideas over the Internet," *Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1122 (9th Cir. 2003), and second, to "encourage voluntary monitoring for offensive or obscene material," *id.* But section 230 is "not meant to create a lawless no-man's-land on the Internet." *Doe v. Internet Brands,* 824 F.3d 846, 852-53 (9th Cir. 2016); *Fair Hous. Council of San Fernando Valley v. Roommates.com,* 521 F.3d 1157, 1163 (9th Cir. 2008). It does not declare "a general immunity from liability" broadly relating to third-party content. *Internet Brands*, 824 F.3d at 852 (quoting *Barnes*, 570 F.3d at 1100); *accord City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010). Rather, the statute's protections must be limited to "its narrow language and its purpose." *Internet Brands*, 824 F.3d at 853. And as the Ninth Circuit has repeatedly cautioned, courts "must be careful not to exceed the scope of the immunity provided by Congress." *Id.* at 853 (quoting *Roommates.com*, 521 F.3d at 1164 n.15).

Plaintiff bases its conflict preemption challenge on section 230(c)(2)(A) of the CDA, Mtn. at 71, which states that "[n]o provider or user of an interactive computer service shall be held

liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *Id.* § 230(c)(2)(A).

AB 587 regulates Plaintiff's activities in accordance with section 230's limits. It penalizes only the failure to post the platform's terms of service, Cal. Bus. & Prof. Code § 22678(a)(2)(A), the failure to timely submit the required, semiannual terms of service report, *id.* § (a)(2)(B), and the material omission or misrepresentation of required information in a report, *id.* § (a)(2)(C).

Plaintiff contends that AB 587 conflicts with section 230(c)(2)(A) because it creates a civil penalty for platforms that "take actions in good faith to restrict access to content as described in 230(c)(2) without making AB 587's required disclosures." Mtn. at 70. AB 587's plain terms do not support this construction, which is premised upon a faulty assumption that a platform cannot both comply with AB 587's reporting requirement while also enforcing its independent content-moderation policies. AB 587 does not require social media platforms to restrict access to content or take any other actions to moderate content. It merely requires certain platforms to make timely informational disclosures about their actual and existing terms of service and content-moderation practices. *See HomeAway.com v. City of Santa Monica*, 918 F.3d 676 (9th Cir.

2019) (finding section 230 did not preempt ordinance prohibiting short-term home rentals; although ordinance required platforms to confirm the host's eligibility before permitting rental, it "creates no obligation on [platforms'] part to monitor, edit, withdraw or block the content supplied by hosts).[11]

Plaintiff also argues that section 230(c)(2)(A) conflicts with AB 578's penalty for material omissions or misrepresentations in the semiannual terms of service report, Cal. Bus. & Prof. Code § 22678(a)(2)(C), which Plaintiff claims gives the Attorney General "unfettered discretion" to punish Plaintiff should the Attorney General find that Plaintiff has restricted access to content in a manner inconsistent with its own policies. Mtn. at 70. This argument misunderstands both AB 587's requirements and the Attorney General's role. Nothing in AB 587 gives the Attorney General authority to penalize social media platforms based on the provisions of their terms of service or how platforms choose to enforce (or not enforce) those terms. Further, none of the topics of the terms of service report requires Plaintiff to disclose particular instances of content moderation, including the underlying content itself or any action taken by Plaintiff in response to it. Instead, the report covers general disclosures about what mechanisms the platform uses to moderate content, Cal. Bus. & Prof. Code § 22677(a)(4), as well as aggregated statistical information about the number of times

[11] Under Plaintiff's logic, section 230 could arguably conflict-preempt virtually any state law. A state law penalizing the failure to pay income tax could be preempted by section 230 because it creates a civil penalty for social media platforms that "take actions in good faith to restrict access to content as described in 230(c)(2)," Mtn. at 70, without paying state income tax. In actuality, the tax law only penalizes non-payment of taxes, just as here, AB 587 penalizes only non-compliance with its disclosure requirements.

the platform flagged or took action on third-party content during the reporting period, *id.* § 22677(a)(5). No penalty can be imposed against Plaintiff under AB 587 for making these disclosures unless its report is untimely or contains material omissions or misstatements. *Id.* § 22678(a)(2)(B), (C). And, as previously explained, any discretion over whether to impose a penalty for a material omission or misrepresentation in the report rests with the reviewing court, not the Attorney General. *Id.* § 22678(a)(1), (3). Thus, AB 587 poses no obstacle to compliance with section 230(c)(2).

Accordingly, AB 587 creates no liability for Plaintiff based on how it moderates third-party content on its site, steering clear of any conflict with section 230(c)(2).[12]

B. Section 230 Does Not Expressly Preempt AB 587

For similar reasons, Plaintiff cannot prevail on its argument that the CDA expressly preempts AB 587's disclosure requirements. Under the CDA's express preemption provision, "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). As explained above, AB 587's penalty provisions are not inconsistent with section

[12] Further, because AB 587's penalties are not tied to whether Plaintiff engages in content moderation, Plaintiff's argument that the thread of sanction under AB 587 effectively forces it to moderate content is unavailing. *See* Mtn. at 72. *HomeAway.com* recognizes a clear distinction between *monitoring* third-party content for the purpose of complying with a regulation, which does not offend the CDA, and *moderating* that content, i.e., determining the extent to which it can be or remain published. 918 F.3d at 682-83. In the former case, the platform's "*choice* to remove [noncompliant] listings is insufficient to implicate the CDA." *Id.* at 683.

230(c)(2) because they do not require Plaintiff to engage in content moderation, and they do not impose liability for Plaintiff's particular content-moderation decisions.

When analyzing express preemption claims, courts "assume federal law was not intended to supersede the states' historic police powers 'unless that was the clear and manifest purpose of Congress.'" *Arellano v. Clark County Collection Service, LLC*, 875 F.3d 1213, 1216 (9th Cir. 2017). Thus, courts "read even express preemption provisions narrowly," using as the "ultimate touchstone" the actual purpose of Congress. *Id.* at 1216-17.

Contrary to Plaintiff's arguments, Congress's purpose in enacting section 230 was not to preempt disclosure laws like AB 587 that impose no requirement to moderate content published on the site. As noted above, Congress sought to "encourage voluntary monitoring for offensive or obscene material," *Carafano,* 339 F.3d at 1122. This concern is reflected in section 230(c)'s title, "Protection for 'Good Samaritan' blocking and screening of offensive material," which highlights Congressional intent to allow and encourage online providers to act voluntarily as publishers without fear of liability when they take steps to ferret out defamatory or otherwise unlawful speech. *Roommates.com*, 521 F.3d at 1163-64. AB 587's disclosure requirements serve this interest, giving platforms that voluntarily engage in content moderation an opportunity to share with consumers the general steps they take to moderate objectionable content, without requiring them to divulge particular content moderation decisions or imposing any penalty

for their action or inaction on specific content.

Because AB 587's limited penalty provisions are not inconsistent with section 230(c)(2) immunity, Plaintiff cannot establish any likelihood of success on the merits of its preemption claim.

III. PLAINTIFF HAS FAILED TO ESTABLISH THE REMAINING *WINTER* FACTORS NECESSARY FOR A PRELIMINARY INJUNCTION

Even if Plaintiff had demonstrated a likelihood of success on the merits as to any claim, it would still need to show that it would suffer irreparable harm absent a preliminary injunction, and that the balance of the equities and public interest favor a preliminary injunction. *See Winter*, 555 U.S. at 20. Plaintiff has established none of these.

As Plaintiffs point out, the loss of First Amendment freedoms does constitute "irreparable harm" for purposes of seeking injunctive relief. *See* Mtn. at 74-75. But as demonstrated above, AB 587 does not unconstitutionally burden Plaintiff's First Amendment rights. And, Plaintiff has not argued or shown that it will suffer any other irreparable harm absent preliminary injunctive relief.[13] Plaintiff has therefore failed to establish this essential *Winter* factor.

Plaintiff also has not and cannot show that the balance of the equities and the public interest weigh in its favor. The public interest favors prompt transparency by social media platforms so that consumers can make informed decisions about where they consume and disseminate news and information. And,

[13] Plaintiff does not argue that a finding by this Court that AB 587 likely violates the Supremacy Clause would suffice to establish irreparable harm.

because AB 587 requires only that large social media platforms merely disclose their actual terms of service and content moderation policies and practices, its burden on them is minimal. Moreover, any potential need for a preliminary injunction pending final judgment is due largely to Plaintiff's lack of diligence in bringing this litigation. After AB 587, Plaintiff waited for nearly one year before filing the complaint and more than one year before moving for a preliminary injunction. *See* ECF Nos. 1, 18. Had Plaintiff acted with diligence, it would have likely mitigated any need for preliminary, hurried relief.

The remaining *Winter* factors therefore favor denial of the requested preliminary injunction.

CONCLUSION

For the reasons above, the Court should deny Plaintiff's motion for preliminary injunction.

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Respectfully submitted,

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